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No. 84-773

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LISA BENDER, *et al*,
Petitioners,

v.

WILLIAMSPORT AREA SCHOOL DISTRICT, *et al*,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS IN THIS CASE

Concerned Women for America Education and Legal Defense Foundation is a national, non-profit membership organization with approximately 600,000 members. At its annual convention held in Washington, D.C. on September 14 and 15, 1984, it adopted the following resolution:

> We believe that the nation's public schools must once again respect equally the rights of students and teachers who have religious beliefs along with those who do not. The right to voluntarily pray, read the Bible, or meet for religious discussion is necessary to achieve such equal treatment. . . . We continue to support the principle of equal access for religious

student groups and call for vigorous enforcement of the law in this regard.

During 1984, Concerned Women for America publically supported the "Equal Access" law that passed Congress (20 U.S.C. § 4071). Representatives from Concerned Women for America actively asked members of Congress to support the bill. The issues in the case now before this Court are very similar to the ones embodied in the Equal Access law.

Concerned Women for America supports the request of Lisa Bender and the other student petitioners, that this Court reverse the Third Circuit Court of Appeals in *Bender* v. *Williamsport Area School District*, 741 F.2d 538 (3rd Cir. 1984).

I

TINKER AND WIDMAR CONTROL THE DECISION OF THIS CASE

The logical application of the holdings of two landmark decisions of this Court compels a ruling that the students should be allowed to meet in the high school's time of open forum for religious meetings. The cases are *Tinker* v. *Des Moines Community School District*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969) and *Widmar* v. *Vincent*, 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981). Although the Third Circuit mentioned and discussed both of these cases, your amicus would submit to this Court that the Third Circuit did not properly apply this Court's rationale from these two cases. Therefore, the circuit court reached the wrong decision in the case at bar.

We would submit that a proper understanding of the controlling principles of *Tinker* and *Widmar* dictate a reversal of the Third Circuit's decision.

Tinker v. Des Moines Community School District

In *Tinker*, this Court recognized that public school students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[1] While this Court acknowledged the important interest the state has in maintaining discipline and order in the public schools[2], this Court has also ruled that the public schools must diligently safeguard the constitutional rights of the individual. Quoting with approval from *West Virginia* v. *Barnette*, 319 U.S. 624, 637, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943), the Court said:

> That [the public schools] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.
>
> —393 U.S. at 507.

This Court ruled that Mary Beth Tinker's action of wearing a black armband to protest U.S. involvement in Viet Nam was protected speech, and could not be prohibited unless it "materially and substantially interfere[d] with the requirements of appropriate discipline in the operation of the school."[3] A mere showing that the school desired "to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint"[4] could not justify a curtailment of the right of freedom of expression.

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[1] 393 U.S. at 506.

[2] 393 U.S. at 507.

[3] 393 U.S. at 509.

[4] Ibid.

The school officials in *Tinker* prohibited the wearing of the black armbands because they did not believe that the content of the ideas expressed were appropriate during the confines of the school day. There was no showing that they attempted to curtail Tinker's right to express her views at home or in other arenas such as her church. The school offered no evidence that the wearing of armbands would somehow disrupt the education process of the public schools in Des Moines. The Court said in *Tinker*:

> [Students] may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.
>
> —393 U.S. at 511.

Clearly, then, the students at Williamsport Area High School, and other public high schools, have the constitutional right to free expression in the public schools, unless their activities "materially and substantially" interfere with the requirements of appropriate discipline in the operation of the school. No evidence in the record even hints or implies that the Petros group would disrupt the normal functioning of the school day at Williamsport. Without such a showing, the rationale of *Tinker* demands that the students be allowed to exercise their First Amendment freedoms.

This Court said that the right of students to freely express themselves was appropriate in classroom discussions, as well as other times of the school day.

> A student's rights, therefore, do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam,

> if he does so without "materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school" and without colliding with the rights of others (citation omitted).
>
> —393 U.S. 512-13.

Therefore, the fact that the Williamsport students wanted to meet during the activity period does not change the constitutional analysis. Students have their constitutional rights from the first bell of the school day, through recess or lunch, until they are dismissed for home. In fact, the activity period at Williamsport Area High School would seem to be the most logical time to have the students meet for a Bible study-prayer meeting.

This Court made it clear that the right of free expression was not limited to symbolic speech such as the wearing of armbands. Lisa Bender and the other student-petitioners cannot be limited to wearing buttons saying, "Christ died for your sins." Such a limitation on *Tinker* is not justified. This Court said:

> The principle use to which the schools are dedicated is to accommodate students during prescribed hours for the purpose of certain types of activities. Among those activities is personal intercommunication among the students. This is not only an inevitable part of the process of attending school; it is also an important part of the educational process.
>
> —393 U.S. at 512.

The right to "personal intercommunications among the students" is the very right at stake in the case now at bar. It is premised not only on free expression, but on the right of freedom of assembly as well. This Court has never said that freedom of assembly is a "second class" right compared to the freedoms of speech and press. In fact, the Court has said the opposite, that "the right to peaceable

assembly is a right cognate to those of free speech and free press and is equally fundamental." *DeJonge* v. *Oregon*, 299 U.S. 353, 364-65, 57 S.Ct. 255, 81 L.Ed. 278 (1937).

When applied to the *Williamsport* facts, the *Tinker* principles militate favorable treatment of the students' rights to assemble for discussion of the Bible and prayer. If this type of activity constitutes free speech, then it cannot be curtailed unless there is evidence in the record which shows that the student Bible study meetings "materially or substantially interfere" with the functioning of the public school. No such evidence exists.

Widmar v. Vincent

This Court held that religious meetings of the type contemplated in Williamsport High School were protected speech under the First Amendment when held on public university campuses. *Widmar* v. *Vincent*, 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981). The Court further ruled that the University of Missouri at Kansas City had established an open forum on campus for all student groups, so the university could not exclude one group based on the religious content of their speech, absent a compelling state interest that abridged the right by the least restrictive means.

The Court in *Widmar* clearly stated that religious speech and religious meetings are protected speech under the First Amendment:

> Here [the university] has discriminated against student groups and speakers based on their desire to use a generally open forum to engage in religious worship and discussion. These forms of speech and association are protected by the First Amendment. See, e.g., *Heffron* v. *International Society for*

> *Krishna Consciousness, Inc.*, 452 U.S. 640, 101 S.Ct. 2559, 69 L.Ed.2d 298 (1981), *Niemotko* v. *Maryland*, 340 U.S. 268, 71 S.Ct. 325, 95 L.Ed. 267 (1951), *Saia* v. *New York*, 334 U.S. 558, 68 S.Ct. 1148, 92 L.Ed. 1574 (1948).
>
> —454 U.S. at 269.

The Court expressly rejected the reasoning that religious speech is not really speech, but worship, and is therefore, entitled to less constitutional protection (see 454 U.S. at 269, footnote 6). Clearly, students have the constitutional right to express their religious beliefs in meetings with like-minded individuals on a public school campus. This Court held that the University was not obligated to create an open forum, but since it did, it could not deny access to the forum to groups for unconstitutional reasons, i.e., because of the content of their speech:

> Through its policy of accommodating their meetings, the University has created a forum generally open for use by student groups. Having done so, the University has assumed an obligation to justify its discriminations and exclusions under applicable constitutional norms.
>
> —454 U.S. at 267-8.

The Third Circuit recognized in *Williamsport* that the high school had created an open forum for the students in the activity period, 741 F.2d at 549-50. Since the school created an open forum, the students' constitutional rights cannot be abridged due to the content of their speech, because religious speech is constitutionally protected speech under the First Amendment.

It should be noted that this Court expressly reserved the question of the applicability of its *Widmar* ruling to "younger students" in footnote 14, 454 U.S. at 274. This exception, however, was a part of the Court's Establish-

ment Clause discussion—a subject we treat below. There can be no question that whether it is in a high school open forum or a college open forum, this type of activity is constitutionally protected free speech. On the strength of *Tinker*, which is of course a high school case, activity that is constitutionally protected free speech, assembly, or free exercise of religion, cannot be curtailed unless there is a material and substantial disruption to the educational process. If there is a high school exception to the principle of *Widmar* it must be made in the Establishment Clause arena, for there is no logical distinction in the area of free speech.

II

THE THIRD CIRCUIT MISCONSTRUED THE ESTABLISHMENT CLAUSE AND USED CONJECTURE AND EVIDENCE NOT IN THE RECORD

The Third Circuit ruled against the students because they said it would violate the Establishment Clause for the public school to allow the students to meet. We respectfully suggest that the Third Circuit misapplied the tripartite Establishment Clause test, and based its decision on conjecture and evidence not in the record.

Since the right of students to meet for religious reasons in a public school is protected speech, the state can restrict it only when it has a compelling state interest, and then only by the least restrictive means, *Widmar* v. *Vincent*, supra, 454 U.S. at 270 and *Williamsport*, 741 F.2d at 550. In both *Widmar* and *Williamsport*, the schools asserted a compelling state interest of abiding by the Establishment Clause. This Court rejected that reasoning in *Widmar*, but the Third Circuit said it applied in *Williamsport* because of different facts.

This Court elaborated a three-part test to see if the state action violated the Establishment Clause. The test is:

1) Does the proposed action have a secular purpose?

2) Does the proposed action have a primary effect which neither advances nor inhibits religion?

3) Does the proposed action avoid excessive government entanglement with religion?

This test was, of course, derived from *Lemon* v. *Kurtzman*, 403 U.S. 602, 612-13, 91 S.Ct. 2105, 2111, 29 L.Ed.2d 745 (1970).

The Third Circuit said that Williamsport High School established the activity period for a secular purpose, and not to promote religion. Therefore, the activity period satisfied the first prong of the tripartite test.

The circuit court held that the prayer meeting would promote religion and excessively entangle the school in religious affairs and thus violate the "primary effect" test and the "excessive entanglement" test.

A substantial reason that the Third Circuit reached a positive conclusion as to the "secular purpose" test, but a negative conclusion for the "primary effect" and "excessive entanglement" test was that the court "switched horses in the middle of the stream." The court judged the religious neutrality of the "secular purpose test" by examining the secular purpose of the "creat[ion of] of the activity period." 741 F.2d at 551. But when examining the second and third prongs of the *Lemon* tripartite test, the court looked exclusively at the Petros student group rather than the entire activity period with the Petros group forming only one portion of the overall student activity program.

This Court recently rejected a similar attempt to segregate out a religious component of an overall governmental activity and to attack the religious portion of the activity on Establishment Clause grounds. In *Lynch* v. *Donnelly*, ___ U.S. ___, 103 S.Ct. 1776, 79 L.Ed. 2d 604 (1984), this Court held that the appropriate way to examine an Establishment Clause question was to look at the whole of the Christmas celebration, not just the nativity scene portion thereof.

We suggest that the correct way to examine the "primary effect" and "excessive entanglement" questions in Williamsport High School is set forth in *Lynch* v. *Donnelly*. The whole scheme must be examined. The religious component of an overall program must not be examined under a constitutional electron microscope.

It is not surprising that the *primary* effect of the religious group will be to advance its religious beliefs. That is a mere tautology. But the primary effect of the activity period is to accommodate the varied interests of its students, not to promote religion. Clearly, the activity period program's *primary* effect neither advances nor inhibits religion, because the Petros group was only one of many student groups meeting during the activity period.

The Third Circuit spoke speculatively and ominously about the "appearances" of having students praying in the public school, that it would somehow look like the state is promoting religion:

> In Williamsport, for instance, meetings of Petros would be held in a classroom which, a few minutes after the meeting, is also used for regular secular classes. Within this more restricted environment, therefore, involuntary contact between nonparticipating students and religious groups is inevitable. Students of differing or conflicting creeds

> would therefore be less able to overlook the activities of such a group within their school, and by the same token would be more likely to perceive a message of endorsement by school authorities that religious activities were approved.
>
> —741 F.2d at 552.

No evidence exists in the record for this speculative conclusion by the Third Circuit. Is it not as reasonable to say that students would learn tolerance and pluralism by seeing people of differing creeds meeting in a public school? Would this not teach students that we live in a nation of differing beliefs, and that we must learn to understand and tolerate them?

The notion that students will somehow think that the school is endorsing religion by accommodating the constitutional right of other students is totally unsupported in the record. The school is no more endorsing the religious beliefs of Petros by permitting them to exist than the Des Moines School District was taken an official anti-war stance by allowing Tinker to wear her armband. No evidence exists that high school students are more immature on the subject of religion than they are on the subject of international politics. Eighteen year-old high school seniors are no more impressionable than 19 year-old college freshmen. High school students would justifiably resent the notion that they must be allowed to hear every side of every issue except religion. In fact it is constitutionally permissible to teach comparative religion in public high schools. *School District of Abington* v. *Schempp*, 347 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d. 844 (1963).

Mature adults would have a difficult time understanding why comparative religion or the Bible as literature may be taught in the public schools, but a voluntary

student group may not meet for religious purposes. If any perception is logically created in the minds of students, it is that the public schools and courts are prejudiced against religion by banning groups like Petros. Such an inference is too dangerous to permit.

As this Court said in *Widmar*:

> An open forum in a public university does not confer any imprimatur of State approval on religious sects or practices. As the Court of Appeals [8th Circuit] quite aptly stated, such a policy "would no more commit the University . . . to religious goals," than it is "now committed to the goals of the Students for a Democratic Society, the Young Socialist Alliance," or any other group eligible to use its facilities. 635 F.2d at 1317
>
> —454 U.S. at 274.

There is no evidence in the record to suggest that this is any different from the situation in Williamsport. The primary effect of an open forum is to allow student expression on all subjects. The fact that a religious group is included sends no unconstitutional subliminal messages to students. Excluding such groups sends the stark message that religious speech is second class speech.

The Third Circuit convolutes the "primary effect" test into a "bad appearances" test, buttresses with some conjectures based only on the judges' perceptions, and finds the students' meetings at the high school unconstitutional. The Third Circuit's opinion that the student meetings violate the "primary effect" test is clearly erroneous.

The Third Circuit also found the student religious meetings excessively entangled the state in religion. The Court focused on the fact that a faculty advisor had to be present at the meetings. This teacher might give the

impression that the school endorses the Bible study[5] and that the teacher might be called upon to referee a doctrinal dispute between the students.[6]

Again, no evidence exists that students perceive teacher-advisors as giving state approval to a club meeting in the school. If this appearance is bad, the Third Circuit could have ordered a "least restrictive means" modification of the compelling state interest to avoid establishment of religion by allowing a parent to be the group's monitor. Instead, the Third Circuit rejected this suggestion with the unsupported assumption that "a parent undertaking the role of monitor would be perceived as a school authority," 741 F.2d at 552-3. No evidence supports this assumption, and it violates common sense. Hopefully, high school students understand the difference between school teachers who are state employees, and parents, who are not.

Therefore, on closer examination, it seems that the school has no compelling state interest in preventing an establishment of religion by prohibiting the students from meeting, because the program passes the *Lemon* tripartite test. No evidence offered to the Third Circuit from the lower court supports the conjectures it made to reach its decision.

Although the Third Circuit examined the appropriate precedents in its decision, it seems that its decision was not made on court precedents, but its perception of what will happen in Williamsport Area High School if the students meet to pray:

> Instead of uniting students from varying backgrounds and beliefs, prayer in the public schools

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[5] 741 F.2d at 552.

[6] 741 F.2d at 557.

> segregates students along religious lines. This works to the detriment of all students, and may particularly ostracize and stigmatize those students who are atheists or adhere to religious beliefs not shared by the majority of their fellow students. The peer pressure in a high school environment exaggerates the ostracism which may be experienced by nonconforming students, especially if they see student leaders or favorite teachers participating in the prayer club, see *Brandon* v. *Bd. of Ed.*, 635 F.2d at 978. Accordingly, we are of the view that, "Sacred practices of religious instruction and prayer [as] the Framers [of the Constitution] foresaw, are best left to private institutions—the family and houses of worship." Id at 973.
>
> —741 F.2d at 561.

This thinking permeates and flavors the Third Circuit opinion. Many of the statements quoted above, which come at the end of the opinion, are arbitrary speculations supported by no evidence in the record.

For example, there is no evidence that the Petros group created any strife when it announced that it would meet. No groups formed against it. The Third Circuit expresses its own fears that the prayer meeting will engender religious strife and convert the public school into the equivalent of Beirut, Lebanon.

Also, no evidence exists that non-Christian or atheist students would be stigmatized by the prayer-meeting students, or that students would feel compelled by peer pressure to attend the meetings if they saw student leaders or favorite teachers attending the meeting. If anything, peer pressure in today's average American high school would keep students *away* from the Bible study, not bring them to it.

If no evidence exists that the prayer meetings disrupt the schools, then they cannot be banned. The Third Circuit offers only its speculation that it might be disruptive and that religion is better left at home or in the house of worship.

But such a statement ignores the precedent of *Tinker* and *Widmar*. Students do not shed their constitutional rights at the schoolyard gate. If the prayer meetings are not disruptive, they cannot be prohibited. The Third Circuit is in fact contradicting *Tinker* and *Widmar* by saying that some constitutional rights are best shed at the schoolyard gate to be left at home or in the house of worship.

It is long-settled that courts decide cases on the evidence before it, not on speculations, assumptions and hypothetical results. The Third Circuit opinion seems to rest more on its own speculations concerning the inner-workings of the minds and hearts of high school students, than either the facts or sound constitutional analysis.

CONCLUSION

The Third Circuit erred in ruling against the students and upholding the prohibition on their school meetings. With powerful precedents such as *Tinker* and *Widmar*, the students' free speech, assembly, and free exercise rights can be limited only by the clear showing of a compelling state interest, and even then, the state may use only the least restrictive means to protect its compelling interest.

The school asserts a compelling state interest of preventing the establishment of religion. The school activity period program passes the tripartite test, and the student prayer meetings do not imply any government establishment of religion. Allowing the students to meet

shows that the government neutrally accommodates its citizens' constitutional rights. Such accommodation by the state of individual liberties should be encouraged and not supressed. The decision of the Third Circuit should be reversed.

May 6, 1985

Respectfully submitted,

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